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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Feng Shui Synergies Corporation

Serial No. 78361958

Robert G. Lancaster of Bryan Cave LLP for Feng Shui Synergies Corporation.

John Dwyer, Trademark Examining Attorney, Law Office 116 (M.L. Hershkowitz, Managing Attorney).

Before Seeherman, Hairston, and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On February 3, 2004, applicant Feng Shui Synergies Corporation applied to register the mark FENG SHUI, in standard character form, on the Principal Register for goods ultimately identified as follows:

Afghans, cloth banners, barbecue mitts, bath linen, bed blankets, bed canopies, bed linen, bed pads, bed sheets, bed spreads, billiard cloth, textile printers' blankets, bolting cloth, fabric for boots and shoes, brocade, buckram, crib bumpers, cloth bunting, calico, crib canopies, fabric cascades, pillowcases, cheese

cloth, chenille fabric, cheviot fabric, crepe cloth, felt cloth, flax cloth, glass cloth, hemp cloth, jute cloth, sail cloth, silk cloth, woolen cloth, cloth doilies, cloth flags, cloth labels, cloth napkins for removing makeup, textile used as lining for clothing, dishcloths, oil cloths, wash cloths, table cloths not of paper, cloth coasters, comforters, cotton fabric, duvet covers, mattress covers, unfitted fabric furniture covers, covers for cushions, curtain fabric, net curtains, window curtains, curtains, damask, dimity, draperies, dust ruffles, duvets, eiderdown quilts, esparto fabric, gauze fabric, nylon fabric, polyester fabric, ramie fabric, rayon fabric, upholstery fabric, woolen fabric, zephyr fabric, silk fabric for printing patterns, linen lining fabric for shoes, fiberglass fabric for textile use, fabric of imitation animal skin, fabric table runners, flannel, frieze, fustian, textile linings for garments, golf towels, handkerchiefs, potholders, jersey fabric material, kitchen towels, household linen, table linen, textile place mats, table mats not of paper, mattress pads, oven mitts, washing mitts, mole skin, mosquito nets, textile napkins, textile napkins for removing makeup, rags for paper making, cloth pennants, pillow shams, window treatment poufs, printed textile labels, window treatment puffs, quilts, sackcloth, shams, shower curtains, shrouds, window treatment swags, taffeta, textile tapestries, textile wall hangings, tea towels, towels, tulle, fabric valances, velvet, [and] zephyr cloth in Class 24 and

Fabric bath mats and textile bath mats in Class 27.¹

The application is based on the applicant's allegation of a bona fide intention to use the mark in commerce. The application contains a translation of the term "Feng Shui" as "the wind and the water."

¹ Serial No. 78361958.

The examining attorney refused to register applicant's mark on the ground that the mark is merely descriptive of applicant's goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). The examining attorney argues (Brief at unnumbered pp. 8-9, footnotes omitted) that:

The term FENG SHUI is defined as, "the Chinese art or practice of positioning objects, especially graves, buildings, and furniture, based on a belief in patterns of yin and yang and the flow of chi that have positive and negative effects."

The "Black Sect version of feng shui, ... explains feng shui as the art of arranging objects within a home to obtain an optimum flow of *qi*."

The evidence of record demonstrates that the term feng shui is descriptive of a style or mode of home or interior decorating, and has descriptive significance in relation to characteristics of goods for use in the feng shui style or mode of home or interior decorating. That is, particular textile materials, colors, and patterns displayed, are characteristic of feng shui home and interior decorating goods and accessories, and that the feng shui style or mode of decorating encompasses using textile goods the same as or similar to the applicant's identified goods.

In response, applicant argues (Brief at 3):

"FENG SHUI" (alone) says nothing specific about the products. It does not let the consumer know that the products are textiles, fabrics or even household items, nor does it state what the nature, scope or purpose of the products are.

In fact, it is unclear from the nature of the mark exactly what the products are or what they do. The mark could just as easily be referring to a series of books about the practice and beliefs underlying the Feng Shui movement, or about architecture or urban planning and design, or about interior office or home design... However, with respect to this application, and

the specific goods recited therein, FENG SHUI does not identify the products, nor what they are designed to do.

After the examining attorney made the refusal final, this appeal followed.

A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). See also In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) (A "mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service"). "Such qualities or properties include color, odor, function, dimensions, or ingredients." In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987) (internal quotation marks omitted).

In order for a term to be descriptive, it need only describe a single significant quality or property of the goods or services. Gyulay, 3 USPQ2d at 1010 ("Clear error has not been shown in the Board's finding that the term APPLE PIE conveys the key characteristics of the

potpourri, its scent"); Meehanite Metal Corp. v. International Nickel Co., 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959) ("A word may be descriptive though it merely describes one of the qualities or properties of the goods"). See also In re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) ("A mark may be merely descriptive even if it does not describe the full scope and extent of the applicant's goods or services") (internal quotation marks omitted).

When we consider the issue of descriptiveness, we must do so by considering the term in relation to the goods or services and not in the abstract because the test is not whether prospective purchasers can guess what the goods or services are after seeing applicant's mark alone. Abcor, 200 USPQ at 218 ("Appellant's abstract test is deficient - not only in denying consideration of evidence of the advertising materials directed to its goods, but in failing to require consideration of its mark 'when applied to the goods' as required by statute").

We now begin by considering the evidence concerning the descriptiveness of the term FENG SHUI. As indicated above, there are dictionary definitions that define the term as referring to the Chinese art or practice of

arranging or positioning objects. The principles of Feng Shui have been incorporated into interior decorating:

Besides specializing in mother of pearl figurines, frames and jewelry, Heermance is also an expert in Feng Shui interior decorating. Her daughter, Ngoc Nguyen, was kind enough to give me some feedback on this ancient practice of creating a tranquil environment. She said you have to buy an altar and place it in front of a business...
Miami Herald, December 12, 2004.

When applied to interior decorating, feng shui involves the mapping of a space to find the areas associated with different elements of life, including career, health and family.
San Antonio Express-News, April 28, 2003.

Within the last several years, Feng Shui - a Chinese interior decorating practice that reduces clutter and purportedly relaxes the soul - has caught on big.
News and Observer (Raleigh, NC), June 11, 2001.

How can color restore and enhance energy, balance and good fortune in your home and life? "Living Color" is an illustrated guide using colors as a key to applying Feng Shui to home decoration, clothing and food preparation.
The State (Columbia, SC), February 10, 2002.

We've all been hearing a lot about "feng shui" recently, a Chinese home-decorating technique that, as near as I can tell, has to do with creating what we called "good vibes" back in the 60's.
Deseret News (Salt Lake City, Utah), March 12, 2001.

Jo Kerr of the University of Charleston will talk about feng shui, the Chinese art of home decorating for physical and psychological health...
Charleston Gazette, March 30, 2000.

Unique Feng Shui collection of products to calm your spirit, Feng Shui home decorating products with tips and gifts... Feng Shui ... sees the world as completely alive with its personality that is directly affected by such details as the arrangement of furnishings, the

location of doors and windows, and the choice of colors and materials.
ValuBuy.net.

By using the Feng Shui techniques in your home, it means that you are using shapes, textures, colors, light, sound, symbolic imagery, and furniture arrangements in order to encourage the best possible flow of energy in your home.
www.esotericcreations.com

The evidence does show that the term "Feng Shui" is intimately connected with interior decorating. Applicant argues (Brief at 8) that there "is nothing about Applicant's goods that has any relation to positioning of graves, buildings, and furniture." However, the Chinese art of "Feng Shui" is not so limited. For example, the ValueBuy.net site refers to: "Unique Feng Shui collection of products to calm your spirit." Even clothes are designed with Feng Shui principles. See
www.esotericcreations.com:

Fabrics favored by Feng Shui fashions are natural textiles such as cotton, but especially linen and fibers that include primarily flax, banana, pineapple, and jute. These are the fabrics that bring us closer to nature, and to a place where we may be more honest with ourselves.

Linen is ideal when it comes to clothing, as it is comfortable to wear, looks pleasing to the eye, takes on dyes very well for expressing the third level of Feng Shui fashion...

Designers such as Nahid Merchant and Lina Tipnis are known for their fantastic pieces using linen in pastel colors to design shapes that provide for the finest Feng Shui silhouettes.

There is also evidence that the term Feng Shui is used in association with goods that are the same or similar to many items for which applicant seeks registration.

Silky baby blankets using the ancient Chinese art of Feng Shui.
www.lillamonsters.com (blankets).

Can't sleep? Get rid of patterned sheets and blankets and opt for solid colors, feng shui experts say.
Chicago Sun-Times, April 30, 2001 (sheets and blankets).

Feng Shui, an Eastern design philosophy meant to promote a sense of harmony and well being, is incorporated into textiles.
Kansas City Star, January 28, 2000 (textiles).

Feng Shui can help dieters. "Eat on black plates," Epstein advises, on black place mats and black tablecloths. The food shows up more."
Sun-Sentinel (Fort Lauderdale, FL), January 2, 1997 (place mats and tablecloths).

This pass-through opening from the kitchen to the dining room in Dave and Inge Turpin's home has been covered with a lace curtain in the feng shui style to keep positive energy flowing in the dining room...
Lansing State Journal, February 20, 1999 (curtains).

The evidence that the examining attorney has made of record shows that there is a style of interior decorating that incorporates Feng Shui principles. This style is based on the Chinese art or practice of arranging objects. Such items as curtains, tablecloths, sheets, mats, and blankets are used to create or design living areas in accordance with Feng Shui principles. When prospective purchasers seeking to design their home's interior

according to Feng Shui principles encounter the mark FENG SHUI on items such as curtains, tablecloths, sheets, blankets, textile place mats and textile bath mats, they would immediately understand that these items incorporate the principles of Feng Shui or would be appropriate to achieve this effect. Therefore, the term FENG SHUI is merely descriptive for applicant's goods in Classes 24 and 27 because it describes a characteristic of those goods, i.e, their compatibility with Feng Shui principles.

Applicant argues its "mark could just as easily be referring to a series of books about the practice and beliefs underlying the Feng Shui movement." However, that would require us to view the mark in the abstract, which, as indicated earlier, is not the test for descriptiveness. Also, applicant maintains that the term FENG SHUI "is clearly not descriptive when used for goods in the present application, such as textiles, fabrics, oven mitts, dish cloths or golf towels." Brief at 5. In response, we note that the evidence above does indicate that Feng Shui *is* used in association with fabrics and textiles. See, for example:

Fabrics favored by Feng Shui fashions are natural textiles such as cotton.

Feng Shui, an Eastern design philosophy meant to promote a sense of harmony and well being, is incorporated into textiles.

Second, the Office does not have the burden of establishing the descriptiveness of every term in the class for which applicant is seeking registration.

[I]t is a well settled legal principle that where a mark may be merely descriptive of one or more items of goods in an application but may be suggestive or even arbitrary as applied to other items, registration is properly refused if the subject matter for registration is descriptive of any of the goods for which registration is sought.

In re Analog Devices Inc., 6 USPQ2d 1808, 1810 (TTAB 1988), aff'd mem., 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

See also In re CyberFinancial.Net Inc., 65 USPQ2d 1789, 1791 (TTAB 2002) ("[I]f applicant's mark BONDS.COM is generic as to part of the services applicant offers under its mark, the mark is unregistrable"). Therefore, even if applicant could establish that the term "Feng Shui" is not descriptive of certain goods in its identification of goods, that would not overcome the examining attorney's refusal.

Applicant also argues that it owns a registration and an allowed application for the term FENG SHUI for clothing. Registration No. 2,840,564 and Serial No. 75776593. Applicant refers to TMEP § 702.03(a)(i) that states in part:

If TRAM indicates that a companion application was previously assigned to a different examining attorney, the examining attorney should not transfer his or her application to that person. However, the examining attorney should review the electronic record of the earlier companion application before taking action in a later companion case, and should act consistently, unless it would be clear error to do so.

See also TMEP § 702.03(a)(iii). However, there is nothing inconsistent with finding that a term is descriptive for goods in one class and not descriptive of goods in another class. Indeed, as in Analog Devices, even within a class the mark may be descriptive of some goods and not others. See also In re Loew's Theatres, Inc., 769 F.2d 764, 226 USPQ 865, 869 (Fed. Cir. 1985) ("The basic flaw in LTI's analysis is that each application for registration of a mark for particular goods must be separately evaluated. Nothing in the statute provides a right ipso facto to register a mark for additional goods when items are added to a company's line or substituted for other goods covered by a registration").

In addition, apparently in response to this argument, the examining attorney has made of record at least one allowed application owned by applicant (Serial No. 78362445) for goods that are very similar, if not identical, to the goods in this application. In that application for the mark FENG SHUI WOOD, applicant

disclaimed the term FENG SHUI. We agree that there has been no inconsistency in this case but rather, as the Federal Circuit has noted, "each application for registration of a mark for particular goods must be separately evaluated." Finally, we add that even if there was a violation of the TMEP's policy, applicant's relief would have been a petition to the Director under Trademark Rule § 2.146, not with an appeal to the TTAB.

The Board's determination on appeal is to be limited to the correctness of the underlying substantive refusal to register. The Board will not second guess the Examining Organization's procedural determination, that is, the latter's application of the "clear error" standard..

However, applicant itself did not take advantage of the proper procedure for review of the "clear error" determination. As noted above, applicant's petition was dismissed as premature, having been taken from a nonfinal action. Thus, the proper procedure would have been for applicant to file a petition after issuance of the final refusal. Applicant failed to do so, and the Board will not, on this appeal, review the Examining Attorney's application of the "clear error" standard.

In re Sambado & Son Inc., 45 USPQ2d 1312, 1314-15 (TTAB 1997). Therefore, to the extent that applicant is arguing that the examining attorney's refusal is not proper because the examining attorney did not follow proper procedure, we cannot review this argument.

Also, the examining attorney has included third-party registrations as evidence in support of his position that

the term "Feng Shui" has been disclaimed or registered on the Supplemental Register.² Third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987). However, the registrations that the examining attorney has made of record are not for the same goods. See, e.g., Registration No. 2,252,195 (FENG SHUI WAREHOUSE for "mail order catalog services featuring ... items necessary to implement the principles of the Chinese art of placement and interior design"; Supplemental Register, "Feng Shui" disclaimed); No. 2,834,942 (WORLD OF FENG SHUI for "retail store services featuring feng shui accessories and products"; "Feng Shui" disclaimed); and No. 2,869,657 (LOTUS BLOSSOM FENG SHUI DESIGNS for "Feng shui design and consulting services; interior design and consulting services"; "Feng Shui Designs" disclaimed). These registrations have limited relevance to the descriptiveness issue in this case.

In this case, we find that prospective purchasers of applicant's goods would immediately understand that the

² With its appeal brief, applicant has also attached copies of several registrations for the term "Feng Shui." The examining attorney objected and we agree that this evidence is untimely. 37 CFR 2.142(d). See also In re Posthuma, 45 USPQ2d 2011, 2012 n.2 (TTAB 1998). We add that these registrations are for different goods and services than those in this application.

term FENG SHUI describes a characteristic of those goods, i.e., that they are compatible with or designed in accordance with the principles of the Chinese art and practice of Feng Shui. Therefore, we agree with the examining attorney that the mark is merely descriptive of the goods in the application.

Decision: The refusal to register under Section 2(e)(1) of the Trademark Act is affirmed.